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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MOISES EDUARDO RUIZ, Defendant and Appellant.	G055935 (Super. Ct. No. 16HF1723) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gary S. Paer, Judge. Affirmed.

Richard Power, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler and Julie L. Garland, Assistant Attorneys General, Arlene A. Sevidal and Andrew Mestman, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant Moises Eduardo Ruiz of two counts of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1); counts 1 and 2),[1] one count of criminal threats (§ 422, subd. (a); count 3), two counts of felony brandishing of a deadly weapon for the benefit of a gang (§§ 417, subd. (a)(1), 186.22, subd. (d); counts 5 and 6), and two counts of misdemeanor brandishing of a deadly weapon (§ 417, subd. (a)(1); counts 7 and 8).[2] The jury also found true allegations that counts 1, 2, 3, 5, and 6 were committed for the benefit of a criminal street gang. The jury further found true allegations that defendant used a dangerous and deadly weapon in the commission of counts 1, 2, and 3. The People subsequently dismissed counts 7 and 8.

The court sentenced defendant to a total state prison term of 15 years 4 months as follows: (1) the middle term of three years on count 1, which was doubled to six years pursuant to the "Three Strikes" law; (2) five years for the gang enhancement on count 1; (3) one year for a dangerous and deadly weapon enhancement on count 1; (4) two years (one-third the middle term of three years doubled for the strike) on count 2; (5) one year 4 months (one-third the middle term of two years doubled for the strike) on count 3; and (6) four years (middle term of two years doubled for the strike) on count 5, and the same on count 6, which were both stayed pursuant to section 654. The court also struck the sentence enhancements on counts 2 and 3.

Defendant raises two issues on appeal. First, he contends the verdict on the criminal threats count is not supported by sufficient evidence. He therefore claims his First Amendment right to free speech and Fourteenth Amendment right to due process were violated. Second, he claims there was insufficient evidence to support the gang

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[1] All statutory references are to the Penal Code.

[2] The jury also found defendant was not guilty of one count of criminal threats (§ 422, subd. (a); count 4). To avoid confusion, we refer to the counts as they were alleged and enumerated in the amended information.

enhancements. As explained below, we disagree with defendant's contentions and, accordingly, we affirm the judgment.

FACTS

The Incident

In December 2016, Jose stood outside the garage of his apartment in the Villas neighborhood of San Juan Capistrano while his mother was inside with two mechanics who were working on her car. Defendant approached Jose holding a knife and skateboard. He held the skateboard over his shoulder and moved it back and forth. Jose testified he felt threatened because he thought defendant would hit him with the skateboard.

When defendant stood about two feet from Jose, he said, "This is my hood. Somebody is going to die today, either me or you."[3] Defendant held the knife pointed toward Jose's stomach and approached until he was about a foot away. Jose testified he was afraid defendant might kill him and indicated defendant appeared to be "drugged" and was "acting crazy." Because Jose spoke Spanish, he did not understand everything defendant said in English, but he recalled defendant also said, "San Juan Capistrano" around three times during the encounter. Jose believed defendant was a "gang banger" and thought "San Juan Capistrano" referred to a gang. He asked defendant "what was going on" and "why [he was] doing that to [him]."

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[3] When Jose spoke to a police officer right after the incident, he told the officer defendant had stated, "This is my hood. Somebody is going to die today, either me or you." At trial, Jose did not mention the first part of defendant's statement: "This is my hood." He testified defendant said, "Somebody is going to die today[,] either you or me." Jose's mother, who did not speak English well, also testified defendant said, "I'm going to kill you" or "You're going to die right now."

Jose's mother stepped out of the garage and told Jose to come inside. She also told defendant to leave. Jose went inside the garage, and defendant followed him. Jose went up some stairs while his mother continued to tell defendant to leave. Jose eventually returned to the garage and saw defendant yelling outside of the garage. Jose's mother called the police, and Jose closed the garage door.

When Orange County Sheriff Investigator Anton Pereyra arrived, Jose and his mother opened the garage and pointed toward where they had last seen defendant. Jose had seen defendant toss his skateboard and other items near some houses. Pereyra eventually observed defendant trying to jump over a wall, and defendant fled when he saw Pereyra. Pereyra got out of his car and pursued defendant on foot. Other officers arrived and assisted Pereyra in handcuffing defendant. Pereyra testified defendant was yelling and appeared to be agitated and intoxicated.

Jose and his mother went to where the police had arrested defendant and saw defendant yelling on the ground. Jose testified defendant looked at him and said "he was going to get out soon." He also recalled defendant saying "Varrio Viejo San Juan" and that "[this] was his hood." According to Jose's mother, defendant also said, "Fuck you." While Jose and his mother spoke to the police, a woman named Brandy approached and stared at Jose, which scared him. Jose had previously seen Brandy with people he thought were gang members.

While defendant was inside the police car, he screamed, cursed, and smashed his head against different things. He also said, "I know where you live" and "Fuck your family." The police searched the area for a knife but did not find one.

According to defendant's testimony, he was visiting his parents who lived in the Villas. He first went to his mother's house to do laundry and then went to his father's house. At his father's house, he saw Brandy and her friend. He spent time with them and consumed some alcohol. He then walked toward an area called "the stoop" to wait for his father and noticed people were staring at him. He testified they looked

shocked, and he thought they stared at him because he was "horse-playing" with Brandy's friend and making a "hoo'ing" sound. Defendant then noticed Jose's mother call the police, but he claimed he had never spoken to her or Jose. He also testified he had never seen Jose before trial and denied running from the police or yelling, but he recalled yelling while inside the police car. He further denied knowing anyone from Varrio Viejo, a gang that claims the City of San Juan Capistrano as its territory.

Gang Evidence

At trial, Sergeant Harrison Manhart testified he had spoken to defendant in 2012. Defendant was with a Varrio Viejo "gang associate" and told Manhart he was in good standing with Varrio Viejo. When Manhart spoke to defendant in 2013, defendant was wearing a shirt depicting swallow birds, which was a common symbol of Varrio Viejo.

Pereyra testified he had spoken to defendant in 2014. Defendant denied being a member of Varrio Viejo at that time but admitted he had previously stated he was a member of the gang. He also admitted he had been arrested with other Varrio Viejo gang members and acknowledged he associated with several gang members.

The People's gang expert, Deputy Jonathan Larson, testified he searched defendant's residence in 2015. He found items related to Varrio Viejo, including a drawing and a sticker of a swallow bird.

Deputy Gilbert Dorado, another gang expert, testified about Varrio Viejo. Among other things, he explained the gang has more than 100 members and active participants. He also testified the gang claims the City of San Juan Capistrano as its territory with the Villas as its "main hub of activity." According to Dorado, gang members often gather by "the stoop."

Dorado explained the gang's primary activities include assault with a deadly weapon, robbery, and felony vandalism. He testified gang members also commonly make criminal threats and brandish weapons. He stated these activities further the purpose of the gang by "instilling fear in the community."

Dorado also testified about the common signs and symbols used by Varrio Viejo, which include a swallow bird and "San Juan Capistrano." He explained the swallow is a common symbol and that over 20 gang members have swallow tattoos. Some gang members also display the various symbols on their clothing.

Dorado further testified he had encountered defendant on approximately six prior occasions. During one of those encounters, defendant began running and yelling, "Narcs, Narcs" when he observed Deputy Dorado. Deputy Dorado believed defendant was acting as a "lookout" for Varrio Viejo. He also noted defendant had tattoos, including a swallow on his right forearm. According to Deputy Dorado, the swallow tattoo indicated defendant was a member of Varrio Viejo.

Given defendant's prior admissions and the items previously collected from his residence, Dorado believed defendant was an active member of Varrio Viejo on the day of the incident. Based on a hypothetical constructed from the facts of the instant case, Dorado also opined the offenses were committed for the benefit of a criminal street gang "[b]ecause instilling fear in the community is a gang's ultimate goal in order for them to achieve their criminal enterprise." He further testified, the offenses "were done to promote the criminal street gang and further the criminal street gang by instilling fear in the community."

DISCUSSION

Defendant Issued a Criminal Threat Within the Meaning of Section 422

Defendant contends his conviction for making criminal threats should be reversed because his statements were ambiguous, did not convey "any prospect of immediacy," and were not directed at Jose. He also claims his conviction violated his First Amendment right to free speech and his Fourteenth Amendment right to due process. However, defendant did not assert his constitutional claims in the trial court proceedings. Regardless, whether reviewed under an independent examination standard or for substantial evidence, there is ample evidence that defendant made a criminal threat in violation of section 422.

A. Applicable Law and Standard of Review

Section 422, subdivision (a) provides, "Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison."

"[A] reviewing court should make an independent examination of the record in a section 422 case when a defendant raises a plausible First Amendment defense to ensure that a speaker's free speech rights have not been infringed by a trier of

fact's determination that the communication at issue constitutes a criminal threat." (*In re George T.* (2004) 33 Cal.4th 620, 632 (*George T.*).) "Independent review is not the equivalent of de novo review 'in which a reviewing court makes an original appraisal of all the evidence to decide whether or not it believes' the outcome should have been different. [Citation.] Because the trier of fact is in a superior position to observe the demeanor of witnesses, credibility determinations are not subject to independent review, nor are findings of fact that are not relevant to the First Amendment issue. [Citations.] [U]nder the substantial evidence standard, the question is whether any rational trier of fact could find the legal elements satisfied beyond a reasonable doubt, whereas under independent review, an appellate court exercises its independent judgment to determine whether the facts satisfy the rule of law. Accordingly, [a reviewing court] will defer to the [trial] court's credibility determinations, but will '"'make an independent examination of the whole record'"' [citation], including a review of the constitutionally relevant facts '"de novo, independently of any previous determinations by the [trial court]"' [citations] to determine whether [the speech at issue] was a criminal threat entitled to no First Amendment protection." (*Id.* at p. 634.)

B. Defendant's Criminal Threat

Here, defendant's statement that "[s]omebody is going to die today" constituted a verbal threat to commit a crime resulting in death or great bodily injury. Defendant contends his statement is an "observation or guess or prediction about some possible event or outcome" and conditional because he stated "one or the other of them is going to die, not both, and not specifically Jose." We disagree. A conditional threat communicates that something will happen *if* a particular condition occurs. Put another way, threat will not be carried out if the condition is satisfied. (See, e.g., *People v. Brooks* (1994) 26 Cal.App.4th 142, 144 ["'"If you go to court and testify, I'll kill you"'"].) Defendant's statement did not communicate a conditional threat. No

conditions whatsoever were attached to defendant's unequivocal threat that "[s]somebody is going to die today." The circumstances under which the statement was made rendered it sufficiently unequivocal and specific to convey defendant's gravity of purpose. After all, defendant stood only two feet away from Jose and held a knife pointed toward Jose's stomach when he threatened: "This is my hood. Somebody is going to die today, either me or you." He also had been holding a skateboard over his shoulder and was moving it back and forth in a way that intimidated Jose.

Gang membership is another appropriate circumstance to consider when determining the nature of a criminal threat. (*People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1340-1341.) Here, defendant repeatedly said, "San Juan Capistrano," which Jose understood to reference defendant's gang affiliation. The gang expert opined defendant was a gang member at the time of the incident. The expert also testified a gang would benefit from defendant's criminal threat because it instills fear in the community, which helps "achieve their criminal enterprise." Given these facts, there was ample evidence defendant issued a criminal threat within the meaning of section 422.

Defendant's reliance on *In re Ricky T.* (2001) 87 Cal.App.4th 1132 is misplaced. In that case, a teacher accidentally opened a classroom door on the minor, and the minor responded by cursing and saying he was going to "get" him or "kick [his] ass." (*Id.* at pp. 1135-1136.) There was "no evidence [the minor] exhibited a physical show of force, displayed his fists, damaged any property, or attempted to batter [the teacher] or anyone else." (*Id.* at p. 1138.) Here, by contrast, defendant stood two feet away from Jose and held a knife pointed at Jose's stomach at the same time he issued his threat "[s]omebody is going to die today."

Relying on *People v. Gonzalez* (2017) 2 Cal.5th 1138 (*Gonzalez*), defendant contends his nonverbal conduct is irrelevant and "the present case must be limited to analysis of just the words spoken by [him]." Nonsense. *Gonzalez* merely held that the plain language of section 422 provides that for a threat to be criminally

actionable it must be "made verbally, in writing, or by means of an electronic communication," and that nonverbal conduct unaccompanied by words does not satisfy the statute. Thus, in *Gonzalez*, our Supreme Court reversed a criminal threats conviction where the defendant made a gang hand sign and "manually simulated a pistol pointed upward," unaccompanied by words. (*Id.* at p. 1140.) As numerous courts have held, a verbal threat is assessed by considering "all the surrounding circumstances and not just the words alone." (*People v. Mendoza*, *supra*, 59 Cal.App.4th at p. 1340.) "[I]t is the circumstances under which the threat is made that give meaning to the actual words used." (*People v. Butler* (2000) 85 Cal.App.4th 745, 753; see also *People v. Bolin* (1998) 18 Cal.4th 297, 340 ["'The use of the word "so" [in section 422] indicates that unequivocality, unconditionality, immediacy and specificity are not absolutely mandated, but must be sufficiently present in the threat and *surrounding circumstances* to convey gravity of purpose and immediate prospect of execution to the victim'" (Italics added)].)

George T., which defendant cites, is also inapt. In that case, a minor showed other students poems he had written, which suggested he had the potential or capacity to kill his fellow students. (*Geroge T.*, *supra*, 133 Cal.4th at pp. 625-626.) One of the poems stated, "'For I can be the next kid to bring guns to kill students at school. So parents watch your children cuz I'm BACK!!'" (*Id.* at p. 635.) Our Supreme Court concluded the poem was not so unequivocal to have conveyed a gravity of purpose and an immediate prospect of executing a threat. (*Id.* at p. 637.) The court noted "incriminating circumstances in this case are noticeably lacking: there was no history of animosity or conflict between the students [citations], no threatening gestures or mannerisms accompanied the poem [citations], and no conduct suggested to [the students] that there was an immediate prospect of execution of a threat to kill [citation]." (*Id.* at pp. 637-638.) The poem in *George T.* did not specify any targets and referred to things the minor "can" do. Defendant's statement here was directed at Jose and

unambiguously threatened "[s]omebody is going to die today, either me or you." Thus, we find no analogy to *George T.*

Finally, *In re Ryan D.* (2002) 100 Cal.App.4th 854), which defendant cites, is distinguishable. In *Ryan D.*, the minor painted a picture of himself shooting an officer and submitted the painting in art class for credit. (*Id.* at p. 858.) The court found there was insufficient evidence the minor intended to convey a threat to the officer because there was no evidence the officer would ever see the painting. (*Id.* at p. 864.) The court also noted that "[a]s an expression of intent, a painting—even a graphically violent painting—is necessarily ambiguous." (*Id.* at p. 863.) Unlike the minor in *Ryan D.*, defendant conveyed his statement directly to Jose while holding a knife, and there was nothing artistic or ambiguous about his statement.

Because we conclude defendant issued a threat within the meaning of section 422, he was not denied due process, and his speech was not constitutionally protected under the First Amendment.

Substantial Evidence Supports the Jury's True Findings on the Gang Enhancements

The jury found the gang enhancement under section 186.22, subdivision (b)(1) true as to counts 1, 2, and 3; and the gang enhancement under section 186.22, subdivision (d) true as to counts 5 and 6.

On appeal, defendant does not dispute he was a member of Varrio Viejo or that Varrio Viejo was a criminal street gang. Instead, he contends he was denied his right to due process because there was insufficient evidence to support the gang enhancements. He claims there was no evidence he committed the offenses "for the benefit of, at the direction of, or in association with [Varrio Viejo] with the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b)(1).) According to defendant, "[t]he present case simply involves crimes committed by an intoxicated, angry person who just happens to be a gang member but who did not do

anything during the incident on behalf of the gang." Defendant accordingly requests we strike the gang enhancement on count 1 (assault with a deadly weapon) and reduce counts 5 and 6 (felony brandishing of a deadly weapon) to misdemeanors.[4] For the reasons below, we disagree and find sufficient evidence supported the gang enhancements.

A. Applicable Law and Standard of Review

Section 186.22, subdivision (b)(1) enhances the sentence for "any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members . . . ." Section 186.22, subdivision (d) similarly enhances the sentence for "[a]ny person who is convicted of a public offense punishable as a felony or a misdemeanor, which is committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members . . . ."

"In considering a challenge to the sufficiency of the evidence to support an enhancement, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings,

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[4] Defendant also requests we strike the gang enhancements on counts 2 and 3 even though the court already struck those enhancements. He contends the jury's true findings on the gang enhancement allegations "could still come back to haunt [him] in the future due to . . . section 1192.7, subdivision (c)(28) and the general provisions of the Three Strikes Laws relating to prior serious felonies." The evidence on counts 2 and 3 is the same as the evidence discussed below. We accordingly have no reason to reach a different conclusion with respect to those counts.

reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] 'A reviewing court neither reweighs evidence nor reevaluates a witness's credibility.'" (*People v. Albillar* (2010) 51 Cal.4th 47, 59-60 (*Albillar*).)

B. Substantial Evidence Supports the Gang Enhancements

The first prong—i.e., that the defendant committed the applicable offense for the benefit of, at the direction of, or in association with a criminal street gang—"requires proof that the defendant commit[ted] a gang-related crime." (*Albillar*, *supra*, 51 Cal.4th at p. 67.) "There is rarely direct evidence that a crime was committed for the benefit of a gang." (*People v. Miranda* (2011) 192 Cal.App.4th 398, 411.) Thus, "'[e]xpert opinion that particular criminal conduct benefited a gang' is not only permissible but can be sufficient to support [a] gang enhancement." (*People v. Vang* (2011) 52 Cal.4th 1038, 1048; see *Albillar*, at p. 63 ["Expert opinion that particular criminal conduct benefited a gang by enhancing its reputation for viciousness can be sufficient to raise the inference that the conduct was 'committed for the benefit of . . . a[ ] criminal street gang'"].)

Here, a reasonable jury could have found defendant's assault with a knife and brandishing of the knife were gang related. The evidence suggested defendant was a Varrio Viejo gang member and that he committed the crimes in the gang's claimed territory. Throughout the incident, defendant also repeated the statement "San Juan Capistrano," which is a sign and symbol associated with Varrio Viejo. Defendant further stated "[t]his is my hood." Although defendant contends he "never mentioned [the] gang during the incident," he identified the gang when he stated "Varrio Viejo San Juan" after he was arrested. Based on a hypothetical involving identical facts, the People's gang expert testified the crimes were committed for the benefit of a criminal street gang "[b]ecause instilling fear in the community is a gang's ultimate goal in order for them to

achieve their criminal enterprise." From this evidence, the jury could reasonably infer defendant's crimes were gang related and benefitted Varrio Viejo.

The evidence also supports the conclusion that defendant intended to promote, further, or assist in criminal conduct by Varrio Viejo gang members. The People's gang expert testified assault with a deadly weapon and brandishing weapons were crimes typically committed by Varrio Viejo gang members. He further opined the offenses "were done to promote the criminal street gang and further the criminal street gang by instilling fear in the community." There also was other circumstantial evidence of defendant's intent, namely, his statements throughout the incident, which included "San Juan Capistrano"; "This is my hood"; and "Varrio Viejo San Juan." A reasonable jury could conclude from all of this evidence that defendant had the requisite intent.

Defendant argues "[h]e did not state he was assaulting [Jose and his mother] on behalf of the gang" during the incident. But nothing in the statute requires defendant to make such a statement or to promote the gang during the offense, only that he promote (or further or assist) criminal conduct by gang members. Defendant also attempts to downplay the importance of his "San Juan Capistrano" statement by arguing this is merely the name of a city and not a gang. But the People's gang expert testified this was a common sign and symbol associated with Varrio Viejo. While defendant claims he was intoxicated and took actions that had nothing to do with the gang, it is not our role to reweigh the evidence. We may reverse for lack of substantial evidence only if "'upon no hypothesis whatever is there sufficient substantial evidence to support'" the conviction or enhancement. (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Relying on *Garcia v. Carey* (9th Cir. 2005) 395 F.3d 1099, defendant also contends there was insufficient evidence he had the specific intent to further "other criminal conduct by the Varrio Viejo gang." In *Garcia*, the defendant and two other people robbed the victim. (*Id.* at p. 1101.) A gang expert testified the defendant and his associates were gang members, the defendant's gang was "turf oriented," and the robbery

occurred in the gang's claimed territory. (*Id.* at pp. 1101-1102.) He also stated robberies were one of the primary activities of the gang and testified about other robberies committed by gang members. (*Id.* at p. 1102.) The Ninth Circuit Court of Appeals found this evidence was insufficient to support the gang enhancement. (*Id.* at pp. 1102-1104.) The court explained, "[T]here is no evidence indicating that this robbery was committed with the specific purpose of furthering *other* gang criminal activity, and there is nothing inherent in the robbery that would indicate that it furthers some *other* crime." (*Id.* at p. 1103, italics added.) We are not bound by lower federal court decisions and decline to follow *Garcia*. (*People v. Brooks* (2017) 3 Cal.5th 1, 90.) We also agree with other California appellate court decisions rejecting *Garcia* as incorrectly decided. (*People v. Romero* (2006) 140 Cal.App.4th 15, 19 ["By its plain language, the [gang enhancement] statute requires a showing of specific intent to promote, further, or assist in '*any* criminal conduct by gang members,' rather than *other* criminal conduct"]; *People v. Hill* (2006) 142 Cal.App.4th 770, 774 [same].)

Defendant further argues the present case is similar to *In re Frank S.* (2006) 141 Cal.App.4th 1192 (*Frank S.*). The facts in *Frank S.* are distinguishable from the facts in this case. In *Frank S.*, an officer initiated a traffic stop of the minor because he failed to stop his bicycle at a red light. (*Id.* at p. 1195.) The minor was carrying a knife, methamphetamine, and a red bandana. (*Ibid.*) He told the officer he had the weapon for protection against a local gang and later admitted he was affiliated with another gang. (*Ibid.*) A gang expert testified the minor was an active member of a gang and that his possession of the weapon benefited his gang because he could use the weapon to protect himself and other gang members. (*Id.* at pp. 1195-1196.)

In finding substantial evidence did not support the specific intent element, the *Frank S.* court stated: "In the present case, the expert simply informed the judge of her belief of the minor's intent with possession of the knife, an issue reserved to the trier of fact. She stated the knife benefits the [gang] since 'it helps provide them protection should they be assaulted by rival gang members.' However, unlike in other cases, the prosecution presented no evidence other than the expert's opinion regarding gangs in general and the expert's improper opinion on the ultimate issue to establish that possession of the weapon was 'committed for the benefit of, at the direction of, or in association with any criminal street gang . . . .' [Citation.] The prosecution did not present any evidence that the minor was in gang territory, had gang members with him, or had any reason to expect to use the knife in a gang-related offense. In fact, the only other evidence was the minor's statement to the arresting officer that he had been jumped two days prior and needed the knife for protection. To allow the expert to state the minor's specific intent for the knife without any other substantial evidence opens the door for prosecutors to enhance many felonies as gang-related and extends the purpose of the statute beyond what the Legislature intended." (*Frank S., supra,* 141 Cal.App.4th at p. 1199.)

Here, on the other hand, not only was there evidence of defendant's criminal history and gang affiliation, the evidence showed defendant was in gang territory, brandished a knife, and threatened to kill Jose while stating "San Juan Capistrano." The other statements defendant made—i.e., "This is my hood" and "Varrio Viejo San Juan"—further distinguish the present case from *Frank S.* The People's gang expert also testified the primary activities of Varrio Viejo include assault with a deadly weapon. He testified gang members also commonly make criminal threats and brandish weapons. Based on a hypothetical involving identical facts, the People's gang expert testified the crimes were committed for the benefit of a criminal street gang "[b]ecause instilling fear in the community is a gang's ultimate goal in order for them to achieve

their criminal enterprise." This is not, as defendant contends, similar to the situation presented in *Frank S.*

Defendant's reliance on *People v. Ramon* (2009) 175 Cal.App.4th 843 is also misplaced. In *Ramon*, an officer stopped the defendant while he was driving a stolen truck in his gang's territory with another gang member in the passenger seat. (*Id.* at p. 847.) The officer found an unregistered handgun under the driver's seat. (*Ibid.*) Neither the defendant nor his passenger made any gang signs or attempted to gain possession of the handgun. (*Ibid.*) At trial, a gang expert primarily relied on the fact that the defendant and his passenger were gang members and were travelling in an area claimed by their gang. (*Id.* at p. 849.) The expert surmised the stolen car and handgun "could be used to spread fear and intimidation." (*Id.* at p. 848.) Based on this, the expert testified the defendant committed the offenses with the specific intent to promote, further, or assist a criminal street gang. (*Ibid.*) In finding the evidence was insufficient to support the gang enhancement, the court noted "[t]here were no facts from which the expert could discern whether [the defendant and his passenger] were acting on their own behalf the night they were arrested or were acting on behalf of [their gang]." (*Id.* at p. 851.)

Here, by contrast, defendant's specific intent was inferred from not only his gang membership and the perpetration of the offenses in Varrio Viejo territory but also his actions. As explained above, defendant made several statements during the incident suggesting his gang affiliation. These statements included "San Juan Capistrano"; "This is my hood"; and "Varrio Viejo San Juan." The People's gang expert also testified the charged crimes were typically committed by Varrio Viejo gang members. Thus, the instant case bears little resemblance to *Ramon, supra,* 175 Cal.App.4th 843.

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

FYBEL, ACTING P. J.

GOETHALS, J.